

HERBERT J. HANSEN

IBLA 91-99

Decided March 25, 1991

Application for an award of legal fees under the Equal Access to Justice Act.

Denied.

1. Administrative Procedure: Administrative Review--Equal Access to Justice Act: Application--Rules of Practice: Generally

The Department's regulations implementing the Equal Access to Justice Act provide a two-tier adjudicatory procedure in which an application for an award of fees and expenses is filed with the adjudicative officer who presided at the adversary adjudication, and the decision of that officer on the application is then appealable to the appropriate appeals board. When an application is filed in the first instance with the Board of Land Appeals, it will ordinarily be transferred to the appropriate adjudicative officer; however, where, as a matter of law, the application must be denied, the Board may adjudicate the application, since transfer of the application would serve no useful purpose.

2. Equal Access to Justice Act: Adversary Adjudication--Surveys of Public Lands: Generally

Under the Equal Access to Justice Act, 5 U.S.C. § 504 (1988), and 43 CFR 4.603, an adversary adjudication is one required by statute to be determined on the record after an opportunity for an agency hearing in accordance with 5 U.S.C. § 554 (1988). Where the Board of Land Appeals orders a hearing in an omitted lands survey case, in accordance with 43 CFR 4.415, such a proceeding is not an adversary adjudication within the meaning of the Equal Access to Justice Act and 43 CFR 4.603.

APPEARANCES: Herbert J. Hansen, pro se; Lori R. F. Monroe, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Herbert J. Hansen has applied to this Board under the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. § 504 (1988), and the Department's implementing regulations, 43 CFR 4.601-4.619, for an award of \$8,937 in legal fees incurred as an intervenor in the administrative proceedings culminating in the Board's decision in Lawyers Title Insurance Corp. v. Bureau of Land Management, 117 IBLA 63 (1990). In that decision, we affirmed Administrative Law Judge Harvey C. Sweitzer's March 27, 1989, decision, rejecting an omitted lands survey performed by the Bureau of Land Management (BLM) because BLM had failed to demonstrate that the acreage excluded from the original survey had been omitted as a result of gross error or fraud on the part of the original surveyor. 1/

[1] Initially, we note that the regulations promulgated by the Department to implement the EAJA envision a two-tier adjudicatory procedure. The regulations state that an application for an award of attorney fees and other expenses "shall be filed with the adjudicative officer" (43 CFR 4.612), who is defined as "the official who presided at the adversary adjudication." 43 CFR 4.602(c). The regulations then provide for review of the adjudicative officer's decision by the Board. 43 CFR 4.617.

Accepting for the moment that this case involved an "adversary adjudication," such adjudication was conducted by Judge Sweitzer; thus, this application for legal fees should have been filed with him, not the Board. See Benton C. Cavin, 93 IBLA 211, 212-13 (1986), aff'd, Cavin v. United States, 19 Cl. Ct. 198 (1989). Ordinarily, in such a situation we would transfer the application to the adjudicative officer for a decision. However, in this case, we find that because, as a matter of law, the application must be denied, transferring the application would serve no useful purpose and would simply amount to an exercise in futility. See Robert C. LeFaivre, 95 IBLA 26, 28 (1986); see also Hoosier Environmental Council, 109 IBLA 160, 165 (1989); Beard Oil Co., 97 IBLA 66, 68 (1987); United States v. Napouk, 61 IBLA 316, 322 (1982); Julie Adams, 45 IBLA 252, 254 (1980). Accordingly, we will adjudicate the matter "to expedite ultimate decisionmaking." Benton C. Cavin, supra at 213.

[2] Section 203(a)(1) of the EAJA, as amended, 5 U.S.C. § 504(a)(1) (1988), provides that

[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other

1/ Hansen and other individuals who claimed title to certain land at issue intervened on the side of Lawyers Title Insurance Corporation which had issued policies of title insurance covering the disputed land. Hansen indicates that if he receives an award he will share it with the other intervenors who helped him "defray the cost of my legal bills" (Application at 3).

expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

The term "adversary adjudication" is defined in relevant part as "an adjudication under section 554 of [Title 5] in which the position of the United States is represented by counsel or otherwise." 5 U.S.C. § 504(b)(1)(C)(i) (1988). By its own terms, 5 U.S.C. § 554 (1988) applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," subject to certain exceptions not relevant here.

The Department's implementing regulations specify the proceedings covered by the EAJA:

These rules apply to adversary adjudications required by statute to be conducted by the Secretary under 5 U.S.C. 554. Specifically, these rules apply to adjudications conducted by the Office of Hearings and Appeals under 5 U.S.C. 554 which are required by statute to be determined on the record after opportunity for an agency hearing. These rules do not apply where adjudications on the record are not required by statute even though hearings are conducted using procedures comparable to those set forth in 5 U.S.C. 554.

43 CFR 4.603(a). The regulatory definition of "adversary adjudication" tracks the language used in the EAJA. 43 CFR 4.602(b). Clearly, the Department intended to exclude from coverage under the EAJA all proceedings not required by statute to be conducted under 5 U.S.C. § 554 (1988). Benton C. Cavin, supra at 215-16; Kaycee Bentonite Corp., 79 IBLA 182, 186-87, 91 I.D. 138, 141 (1984); In re Attorney's Fees Request of DNA--People's Legal Services, Inc., 11 IBIA 285, 297, 90 I.D. 389, 395 (1983).

Although a hearing was held in this proceeding, no statute mandated such a hearing. Rather, the Board ordered the hearing pursuant to 43 CFR 4.415 to enable the parties to elicit facts necessary to the proper resolution of the case. Thus, even though the hearing was conducted using procedures comparable to those set forth in 5 U.S.C. § 554 (1988), it is, by regulation, excluded from coverage under the EAJA. Since there was no "adversary adjudication" in this case within the meaning of the EAJA and the regulations, there can be no award of legal fees. See Kaycee Bentonite Corp., supra at 190, 91 I.D. at 143 (noting that "not every case involving a protectable right to due process must be treated as one arising under section 554, and the mere fact that the Department affords due process by utilizing the same procedures does not convert such a case to a section 554 adjudication."). 2/

2/ BLM also argues that no fees should be awarded because its position was substantially justified, focusing solely on its legal position taken as a

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Hansen's application for legal fees is denied.

Bruce R. Harris
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

fn. 2 (continued)

party to the adjudication, and asserting that its underlying actions have no bearing on the substantial justification issue. The EAJA, as amended, however, defines the "position of the agency" as, "in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based." 5 U.S.C. § 504(b)(1)(E) (1988). We need not decide whether BLM's position in this matter was substantially justified because we find that the regulations prohibit an award in this case.